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No. 03-192

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IN THE

Supreme Court of the United States

VILLAGE OF ISLANDIA, NEW YORK BOARD OF FIRE UNDERWRITERS, and ALEXANDER C. PIRNIE,
Petitioners,

v.

ELECTRICAL INSPECTORS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition offers no convincing basis for denying review.

1. As the Petition explained, the decision below resolved three significant, closely-related questions of antitrust immunity law in a manner that cannot be reconciled with this Court's teaching or with the understanding that prevails in other federal circuits.

a. The Second Circuit rule untethers the "active supervision" requirement of *Midcal* from its moorings in federal antitrust law. Where this Court's cases have inquired into "active supervision" when *private conduct that would otherwise violate the Sherman Act* is defended on the ground that it is authorized by State law, *see, e.g.*, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1991) (private price-setting agreement); *Patrick v. Burget*, 486 U.S. 94, 101 (1986) (concerted refusal to deal), the decision below held that a local government's entitlement to immunity depends on its persuading a federal court that its "supervision" of the *"quality of service*[]," Pet.App.25a (emphasis added) provided under a lawful exclusive designation was "active" enough.

i. Whatever similarity the "poor service" Islandia residents supposedly receive on account of the exclusive designation may bear to the *effects* of conduct that violates the Sherman Act, "poor service" is not the sort of *anti-competitive conduct* that triggers "active supervision" analysis. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (that restraint has the same *effect* as concerted action is not a basis for Section 1 liability); *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001); *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n,* 197 F.3d 560, 565 (1st Cir. 1999).

ii. Indeed, the central harm *to competition* – and to Respondent, the Board's would-be competitor – is effected by the *designation itself*, the lawfulness of which was resolved by the Second Circuit, in a ruling unchallenged here, *see* Pet.App.14a-16a (holding *Town of Hallie* test to have been

satisfied).[1]

iii. Consistent with these principles, the Petition showed, the vast weight of authority outside the Second Circuit rejects (explicitly and by necessary implication) the notion that allegations of "low quality service" (or even "high prices," *see Arsberry*, 244 F.3d at 566), *pursuant to a lawful exclusive designation*, should trigger the *Midcal* inquiry. Indeed, as we explained, the Second Circuit's decision would effectively limit this Court's most recent local government immunity decision, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), to its facts. The plaintiff in that case surely *could have* raised triable factual issues as to whether the incumbent's service to its customers was satisfactory (not to mention whether the municipality's supervision of that service was sufficiently attentive).

b. The Second Circuit rule also breaks with settled law in treating allegations that a private party is "abusing" the "monopoly" effected by a lawful designation – *i.e.*, by engaging in private "anticompetitive" transactions "subsequent to" the designation, Opp. 3 – as shifting the applicable immunity analysis from *Hallie*'s standard to *Midcal*'s.[2] Even if Respondent's scattershot allegations of business misconduct outside Islandia could be substantiated

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[1]The unarguable significance of *that* ruling is that both the exclusive designation and its *adverse effect on competition* were authorized under State law. *See id.* 15a (concluding that "[t]he specific anticompetitive harm * * * [*i.e.*,] plaintiff's complete exclusion from the market * * * * [was] a foreseeable result of [the New York] statute").

[2]In using the term "monopoly" to describe the Board's position in Islandia, Petitioners obviously do not concede that the Village (whose total population is roughly 3000, and which is one of 31 incorporated villages within Suffolk County alone) could be described as a "market" for purposes of any substantive antitrust law analysis. Similarly, Petitioners make no concession that the New York Board is, for all relevant purposes, "private." *Compare* Opp.2 n.2 *with* Pet. 1 (correctly describing it as "a quasi-public, not-for-profit, fire safety body"). Rather, we recognize that the questions presented for this Court's decision would require the same answer in a case involving (as many do) a designee that (unlike the Board) is "private" in every sense.

(and even if they stated cognizable violations the *Sherman Act*) – that law does not make local governments accountable for "private transactions" of their designees that are conceded to be "independent of" any municipal action.

3. Building on these two rulings, the appeals court committed further error in holding that the federalism concerns underlying *Parker* immunity did not require dismissal of the Village from the case, even after it was settled that Islandia's only challenged conduct – the delegation – was entirely lawful. The rationales for this ruling – that, federalism concerns are muted because Islandia is not a "sovereign" and because further litigation would result (at most) in injunctive relief, Pet.App.28a – are irreconcilable with this Court's case law, and the ruling gives drastically short shrift to the incursion on State sovereignty inherent in a federal antitrust court's passing judgment on a local governments' performance of its traditional public safety responsibilities.

2. EII's Brief in Opposition does not dispute the importance of the immunity issue involved here, and its limited attempt to disprove the conflict between the Second Circuit's rulings and the decisions of other federal courts does not extend to addressing the decisions cited in the Petition – or even acknowledging, let alone discussing, this Court's decision in *Omni*.

Instead, Respondent principally (1) insists that the questions presented are not "ripe" for review (Opp. 6) and (2) seeks to show that the Second Circuit's decision – at least with respect to the New York Board – was correct on its merits (the Opposition offers no defense of the Second Circuit's decision to require the Village to defend the case – and simply omits that issue from its "restatement" of issues presented).

As we show, review at this juncture is not only appropriate, but – in view of the importance of the question, the conflict among the federal courts, and the special need of local governments for clear *ex ante* guidance – necessary. To

the extent the correctness *vel non* of the decision below are relevant to this Court's certiorari decision, moreover, they strongly favor review.

I. The Questions Presented Are Ripe for Review

A. EII argues that review ought to be denied because the issue whether Islandia's "supervision" was active enough is the subject of a fact-intensive dispute, one which the Second Circuit permissibly left for the district court to determine in the first instance. *See* Opp.5-6; *id.* i (purporting to "re-phrase" questions presented to include whether it was error to describe the "supervision" inquiry as "heavily factual").

1. But the Petition *does not* seek review (even "implicitly," Opp.6) of the appeals court's decision not to conduct the second *Midcal* inquiry for itself. Rather, the Petition raises the threshold legal question: whether immunity *should* depend on persuading a federal court that the Board's "quality of service" is being actively supervised. As the district court held, even if questions about the Village's supervision are "hotly" disputed, Opp.5, such disputes are, under correct legal principles, "[im]material." *See* Fed. R. Civ. P. 56(c).[3]

2. Respondent's criticisms of Petitioner's statement of the case (Opp. 2-5) proceed from the same misunderstanding. Whether a defendant is accused of providing "no supervision," *id.* at 4 – as opposed to merely inadequate supervision – or whether the supervisory "deficiency" extends to rates, as well as "service" – is no moment if, as the district court correctly held, *see* Pet.App.40a, "supervision" is not a

[3]To be clear, Petitioners do not disavow their alternative argument below, *i.e.*, that the record in this case conclusively establishes that Islandia's supervision of the New York Board *is* active. Rather, we recognize that if the Second Circuit *were* right in pronouncing the "supervision" issue *material*, *see* Fed. R. Civ. P. 56(c), its decision to allow the district court to determine whether Respondents have carried their burden of identifying a "*genuine*" factual dispute on that point, *id.*, would not warrant this Court's discretionary review. *See* S. Ct. R. 10.

proper part of the immunity analysis.[4]

B. The questions the Petition actually *does* present can and should be resolved at this juncture. The prospect that Petitioners will prevail at the end of a fact-intensive immunity inquiry – or that Respondent's case will falter at the liability or remedy stage, *see* Pet.App.29a – is hardly the equivalent of pretrial dismissal under the proper immunity standard. *See* 1A AREEDA & HOVENKAMP, ANTITRUST LAW at 387 (2000) ("the *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial"). As numerous courts have recognized in entertaining interlocutory appeals from adverse immunity decisions (*see* Pet.22.), the protections of the *Parker* doctrine are not vindicated when a local government *ultimately* prevails, after being subjected – unnecessarily – to the burdens of litigation.

1. The need for prompt review is especially strong because the impact of the Second Circuit's rule extends so far beyond its effect on the outcome of *litigated disputes*. As even EII recognizes (Opp. 6), the existence of treble damage liability for private parties and the expense of litigation for government defendants means that even *correct* (but less-than-bright-line) immunity rules carry substantial potential to deter government actions that, if actually adjudicated, would be upheld as lawful.

2. Respondent's rejoinder, that such deterrence and uncertainty are inevitable concomitants of the active supervision requirement, *see* Opp.6 (quoting Justice Scalia's concurring opinion in *Ticor Title*), paints with far too wide a brush. The breadth of governmental (and private)

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[4]On the subject of rates, even if it is overlooked (1) that Respondent's complaint dwelled exclusively on "service" allegations and (2) that *EII* was the source of the idea that the Board's rates are unfairly *low*, Pet.6, the uncontested fact that the Board charges Village customers *the same price* as it does those in jurisdictions where open competition prevails, Opp.2., would rule out any minimally plausible claim of monopoly pricing. In any event, *EII* is not injured by the prices the Board charges in Islandia – only by the exclusion effected by the Village resolution.

decisionmaking affected by the Second Circuit's rule is orders of magnitude beyond that which the concurring opinion in *Ticor* pronounced tolerable.

Not only is "active supervision" of "quality of service" a far more nebulous concept than the active rate review required under *Ticor*, *see Omni*, 499 U.S. at 377 (rejecting, as "impractical[ly] * * * vague," rule that would deny immunity to governmental actions adjudged "not in the public interest"), but the Second Circuit's rule is not limited to the discrete, relatively rare situations where a government authorizes private competitors to set rates by agreement (or to engage in other conduct that is, in the absence of government permission, comparably offensive to the Sherman Act). It extends to *every* exclusive government franchise or designation – and, as a logical matter, to any governmental act that has the effect of eliminating, diminishing, or failing to encourage competition. *See* Pet. 13-15 (citing variety of governmental decisions affected).

II. There Is A Real And Plain Conflict Between The Second Circuit Rule And Decisions of This And Other Federal Courts

Respondent's purported demonstration that there is "no conflict" of authority (Opp. 10-13) consists of (1) ignoring the many closely analogous – and nearly identical – cases the Petition identifies (Pet. 12-15), in which assertions of immunity were sustained without any "active supervision" inquiry (and where a different result would likely obtain under the Second Circuit rule) and (2) directing the Court instead to decisions where *the applicability* of the "active supervision" prong was not in issue – and where (as in *Ticor*) the parties' only dispute concerned whether that standard was satisfied.

A. As the Petition explained, the Ninth Circuit's decision in *Charley's Taxi* (which the Opposition omits to discuss) expressly rejected the proposition that active supervision must be shown when a competitor challenges an exclusive designation – and the First and Seventh Circuits' decisions in

Arsberry and *Mass. Food Ass'n* (which Respondent also does not address) cogently explain the reasons why *rate* regulation – let alone "service" supervision – of an exclusive designee is not mandated by *antitrust* law. Indeed, *Charley's Taxi* reversed a district court decision that had denied immunity on grounds of failure to supervise service. *See* Pet.17.

1. The Sixth Circuit's decision in *Michigan Pay-Tel Joint Venture v. City of Detroit*, 287 F. 3d 527 (6th Cir. 2002), which Respondents *do* cite in passing (opp.12), is in square conflict with the Second Circuit's ruling. There, as here, the private party's exclusive designation (as sole provider of pay telephone service for prisons) was claimed to be part of a broader "pattern of unlawful and/or anti- competitive conduct calculated to attempt to monopolize the [local] pay telephone service market," *see* 287 F.3d at 535. Indeed, unlike here, the governmental defendant was charged with "knowingly facilitat[ing the private party's] anti-competitive conduct" and seeking to ensure its "monopolistic position in the pay telephone service market," *id.* These allegations, the Sixth Circuit explained, did not trigger the *Midcal* analysis, because the "effective decision" at the core of the case – the designation – was governmental in character, *id.* at 538.

2. These decisions are strongly reinforced by many other cases (cited at Pet. 13-15), in which exclusive governmental designations were held entitled to immunity, without any inquiry into either the designee's "quality of service" or the government's supervision thereof. As the Petition explains, any claim that these do not conflict with the Second Circuit's rule, depends on an unacceptable "formalism," *see Motor Carriers*, 471 U.S. at 57, *i.e.*, treating them as resting on plaintiffs' (presumed) failure to allege that the exclusively designated entity was providing "low quality service" – precisely the sort of "charge" that *every* disappointed rival can direct at every governmentally-designated competitor. *See Omni*, 499 U.S. at 375, 377 (noting that "[f]ew governmental actions are immune from the charge that they are 'not in the public interest'" and that an immunity

"exception" based on such claims could "swallow up the *Parker* rule").

Likewise, the necessary implication of the Second Circuit's rule is that the correctness of this Court's *Omni* decision depends on the absence of "poor service" allegations in that case. That would be an implausible account under any circumstances, and it is all the more so because there *were* other allegations in *Omni* – of "trade libel, the setting of artificially low rates, and inducement to breach of contract," 499 U.S. at 384 – but this Court refused to treat these sundry allegations of "private anticompetitive action[]," *id*, as bearing on the municipal defendant's (or even the private defendant's) *antitrust* immunity.

B. The decisions Respondent does cite provide no support for the free-floating duty of "active supervision" imposed by the Second Circuit. On the contrary, the private conduct requiring "supervision" in cases such as *Municipal Utilities Bd. v. Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994) and *Sandy River Nursing Care v. Aetna Casualty*, 985 F. 2d 1138 (1st Cir. 1993), are precisely the kind that (unlike *being a* monopolist, *see* Pet.App.35a, or providing "poor service") *would* – in the absence of authorization – plainly offend the Sherman Act, *see* 985 F.3d at 1146 (jointly proposed rates); *compare* 21 F.3d at 384 (agreement to allocate service territories) *with United States v. Topco Assocs.*, 405 U.S. 596 (1972).

Of course, if the cited decisions *did support* the Second Circuit – and thereby contradict the Sixth, Seventh, and Ninth Circuits – on the relevant legal point, that would be a further argument *in favor* of, not against, review by this Court. *Cf.* Pet.13 & n.11 (noting portions of decisions in *Englert v. McKeesport*, 637 F. Supp. 930 (W.D. Pa 1986) and *Southern Disposal, Inc. v. Texas Waste Mgm't*, 161 F.3d 1259 (10th Cir. 1998)), which could be read as supporting the Second Circuit's analysis).

III. The Second Circuit's Decision To Require The Village To Defend This Suit Warrants Review

The Brief in Opposition does not even mention, let alone defend the Second Circuit's further holding, *i.e.*, that the Village – whose only contested action (the exclusive delegation), has been held to *satisfy* the *Hallie* test -- should nonetheless be forced to defend the suit, on the ground that various of the Board's alleged bad acts were "pursuant to" the governmental designation and because, as the appeals court believed, the federalism concerns undergirding *Parker* immunity operate with less than full force when a political subdivision, rather than a State itself, is a defendant. In fact, the Opposition takes pains to emphasize that the only actions properly in issue are "private," Opp.12 , *i.e.*, ones that are "*clearly not those of*" the Village. Opp.3 (emphasis added).

For the array of reasons set out more fully in the Petition, this extraordinary ruling also warrants this Court's review and correction. First, even accepting that the Board's allegedly bad business behavior amounts to *anti-competitive* conduct within the reach of the *Sherman Act*, *but see* Pet.27, the further premise, that the Act imposes a species of vicarious liability on local governments, for "facilitating" independent violations by their designees, cannot be reconciled with either *Omni* or *Michigan Pay-tel*. Both those decisions sustained immunity, in the face of charges (and proof) of municipal involvement in private anti-competitive schemes of a character not even alleged here. Indeed, as just noted, the plaintiff in *Omni* sought to raise the very same sort of boilerplate unfair competition allegations that led the court below to fundamentally shift its analytical framework, but this Court, unlike the Second Circuit below, properly recognized these ancillary claims as essentially irrelevant to the immunity question.

Second, *Omni* – a case with a municipal defendant and one which highlighted the central importance of "fundamental principle[s] of federalism," 499 U.S. at 389, to *Parker* doctrine, stands against any sharp distinction between

the acts of "sovereigns" and those of local governments (acting under State authority), and as explained above, the prospect that liability will not be imposed or that relief will be limited to an injunction is cold comfort to a party entitled to *Parker* immunity.

Finally, the decision fails even to acknowledge the federalism costs of interposing antitrust courts in an arena – public safety – where local government responsibility has historically been greatest and where exclusive (government) provision, not open competition, is the historic norm. Indeed, unlike in product markets where the "public interest" and "customer satisfaction" are substantially coextensive, the "poor service" EII complains most loudly about – *e.g.*, "drive by inspections," where no real effort is made to look for defects needing repairs – are precisely the kind of "service" that many property owners, left to their own choice of providers, would opt for. *See Camara v. Municipal Court*, 387 U.S. 541, 552-53 (1967) (Clark, J., dissenting) (explaining that "[i]mmediate prospects for costly repairs" lead large percentages of homeowners to reject safety inspections at government expense). It is precisely because Village residents have an independent interest in thorough inspections (one that does not track individual property owners' cost-benefit analysis) that exclusive designations and (exclusive) municipal provision remain the norm.

Once it is recognized that the dispute here is, at bottom, one about how best to provide for the safety of those within Islandia's borders, the "presumption," *Hallie*, 471 U.S. at 45, that the Village's elected government – and not a federal antitrust court – is best suited to make decisions is sound as a matter of fact and decisive as a matter of law.

Conclusion

For the reasons set forth above and in the petition, certiorari should be granted in this case.

Respectfully submitted,

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